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Widespread Change Inevitable for All American Health Insurance Plans, Including Union Defense Contractors; and the Unintended National Security Risks Tied to Healthcare Reform and the Cadillac Tax

Brooke Michel Elliott^{*}

ABSTRACT

America's healthcare spending and unaffordable costs are addressed by the Patient Protection and Affordable Care Act ("ACA") and are long overdue. However, the ACA has not only fueled debates but has also produced unintended national security risks because of corporate America's response to administrative complexities and taxes inherent in the Act. This Note considers the national security risks triggered by the ACA largely due to the majority of the Department of Defense contracts being performed by a few large American corporations; most of which are faced with high taxation under the Act if health insurance plans offered to employees are not changed. This Note concludes the ACA should not be completely repealed but instead recommends that amendments are enacted

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to allow Americans and American corporations to continue to exercise freedom choosing healthcare plans best suiting their individual needs and the needs of our nation. These amendments are necessary to ensure national security without imposing burdensome taxation on corporations responsible for vital U.S. military weapon research, engineering, development, and production.

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I. INTRODUCTION

*Changes are Necessary, but what they ought to be, what they will be, and how, and when to be produced are the arduous questions.*¹

-John Jay

Enactment of the Patient Protection and Affordable Care Act, the (“ACA”), is causing some employers to think twice before offering healthcare to employees. Rising costs, unpredictable projections, and delays are likely to induce behavioral changes from employers. However what those changes will be is still unknown, especially since one of the most onerous provisions informally known as the “Cadillac Tax,” is not effective for nearly three years.²

Both employees and employers should be aware not only of costly repercussions of the Cadillac Tax and other ACA provisions, but also of the unintended consequences on national security, privacy and union employment contract negotiations.³ Provisions such as the Employer Mandate require employers to provide a certain standard of healthcare benefits to employees while the Cadillac Tax penalizes employers who offer excessive benefit plans for employees,⁴ thereby pigeonholing healthcare benefits into a neat package while failing to reflect the actual complexities of healthcare benefits and the variations of plans needed for diverse industries and demographics.

Moreover, unions which have historically offered generous benefit plans for members will likely encounter resistance from employers when collective bargaining agreements expire because employers are unsure of the true costs and burdens accompanying the ACA and how those costs will affect business and profits.⁵ Therefore, highly unionized industries

¹ JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 682 (Alfred A. Knopf, inc., 1st ed. 1996)(quoting John Jay to Thomas Jefferson, Oct. 27, 1786).

² See Pub. L. No. 111-152, tit. V, 124 Stat 1060 (2010) (codified at 26 U.S.C. § 4908I) (2010) (providing that amendments apply to taxable years beginning after Dec. 31, 2017).

³ Noel C. Pace & Marlene M. Duarte, *Patient Protection and Affordable Care Act*, 2015 HEALTH & COMPLIANCE UPDATE, 69-70 Ch. 1 (John Steiner, ed. 2015).

⁴ *Id.*

⁵ Paula M. Secunda, *The Forgotten Employee Benefit Crisis: Multi-employer Benefit Plans on the Brink*, 21 CORNELL J. L. & PUB. POL’Y 77,79 (2011).

should be aware that the days of generous health benefits are more than likely coming to an end.

More importantly, United States constituents must be vigilant of national security threats facing America not only because of the administrative complexities and reporting requirements inherent in the Employer Mandate, but also because of the burdensome taxation imposed by the Cadillac Tax. Large corporations responsible for performing the vast majority of the United States (“U.S.”) Department of Defense (“DOD”) contracts also have high union membership. Since unions are known for offering top-notch health insurance for members, the Cadillac Tax will result in hefty penalties for either the unions or corporations if health insurance plans do not change.

This Note first explores the history of the U.S. health insurance system, which was long overdue for reform. Provisions of the ACA, particularly the Employer Mandate and Cadillac Tax, are also analyzed in order to illustrate potential impacts on U.S. national security and employment contract negotiations. Finally, this Note argues that while the Cadillac Tax and ACA potentially raise revenue and counteract an Internal Revenue Code (“IRC”) tax loophole, unaffordable healthcare costs are not remedied. Therefore, the model is not only inefficient but also inequitable and should be amended to solve America’s healthcare crisis.

II. HISTORY OF THE AMERICAN HEALTHCARE SYSTEM

Rising costs of medical care and health insurance impact the livelihood and daily lives of Americans.⁶ Unfortunately, the U.S. has one of the worst healthcare systems, but ironically one of the most expensive.⁷ Run by for-profit health insurance corporations, the United States was for a long time one of the only industrialized countries without some form of Universal Health Care.⁸ In fact, prior to 2014 fifty million Americans (one-sixth of the U.S. population) were uninsured, probably due to the fact individuals and employers in the U.S. consistently pay higher prices for health insurance than any other

⁶ See generally Pace, *supra* note 3, at 70-79.

⁷ Mary Agnes Carey, *Growth in the U.S. Health Spending in 2013 is lowest since 1960*, KAISER HEALTH NEWS (Dec. 3, 2014) <http://kaiserhealthnews.org/news/growth-in-u-s-health-spending-in-2013-is-lowest-since-1960/> (finding health spending in the U.S. is an estimated \$2.9 trillion per year and healthcare is 17.9 of annual GDP).

⁸ Max Fisher, *Here’s a map of the Countries that provide Universal Healthcare (America’s Still not on it)*, THE ATLANTIC (Jun. 28, 2012, 6:09 PM), <http://www.theatlantic.com/international/archive/2012/06/heres-a-map-of-the-countries-that-provide-universal-health-care-americas-still-not-on-it/259153/>.

developed country in the world.⁹ Still, U.S. citizens are currently plagued with poor health and chronic illness, which leads to even higher medical costs and unaffordable coverage. Dissatisfaction with the U.S. healthcare system is widespread; unfortunately for decades reform efforts have failed.¹⁰

The historic model of the U.S. health insurance system was an accidental system stemming from the IRS's decision to exclude health insurance from gross income.¹¹ During World War II the War Productions Board followed the IRS's lead and excluded health benefits paid to employees from its various wage controls.¹² Since workers were demanding wage increases that were prohibited by wartime wage controls, factory employers wanted a method to attract workers without raising wages. Therefore, although employers were unable to raise wages, they were able to entice workers to change jobs by offering health insurance.¹³ After World War II Congress codified the Service's ruling by enacting IRC 26 U.S.C. § 106 in 1954, leaving employer sponsored insurance ("ESI") completely exempt from taxation.¹⁴

Today, policymakers argue the purpose of the ACA is to begin eliminating what is known as one of Internal Revenue Code's largest tax loopholes, the ESI exemption.¹⁵ Economists estimate at least \$245 billion of federal revenue is lost each year due to the ESI tax loophole.¹⁶ Therefore, changing the treatment of ESI is a natural means to begin funding healthcare reform.

⁹ Press Release, U.S. Census Bureau, Income, Poverty, and Health Insurance in the United States: 2009 (Sept. 16, 2010), available at http://www.census.gov/newsroom/releases/archives/income_wealth/cb10-144.html.

¹⁰ See generally David Koeninger, *Removing Health Care From Employer and State Control: The ACA as Anti-Subordination Legislation*, 44 U. BALT. L. REV. 201 (2015).

¹¹ IRC Contributions by Employers to Accident and Health Plans, 26 C.F.R. §106-1 (1954)(providing that the employer may contribute to a health plan either by paying a premium on a policy of a health insurance covering one or more of his employees or by contributing to a separate trust or fund which provides health benefits directly or through insurance to one or more of his employees); see also Eleanor Hagan, *Sometimes That Cadillac Is A Lemon: Why the High-Cost Health Insurance Excise Tax Needs a Tune-Up Before Implementation*, 66 TAX LAW, 251, 257 (2012).

¹² Hagan, *supra* note 11, at 257.

¹³ *Id.*

¹⁴ 26 U.S.C. § 106 (a) (1954).

¹⁵ See Hagan, *supra* note 11, at 254.

¹⁶ *Id.*

III. THE ACA: REFORM IS HERE TO STAY

Healthcare reform in the United States is so critical that without significant change heavy financial burden will continue to plague U.S. citizens. The ACA, more commonly known as “Obamacare,” is the Obama Administration’s nearly 11,000 page (or three feet high if printed) set of regulations reforming healthcare in America.¹⁷ The general purpose of the ACA is “[t]o increase the number of people in America with healthcare coverage,”¹⁸ while also making health insurance more affordable for Americans.¹⁹ The ACA relies on shared responsibility among corporations, individuals, and insurance companies for its success.²⁰

Because the ACA provisions are still in preliminary stages of implementation and provisions are not effective collectively for at least another three years, actual results, expenses and cost savings are not fully understood. Some Americans are skeptical and question whether the ACA will actually lower healthcare expenses for middle class, working Americans.

In addition, although the Individual Mandate, a provision of the ACA, was held by the United States Supreme Court as a constitutional tax under the Taxing and Spending Clause in *National Federation of Independent Business v. Sebelius*,²¹ there are still cases pending that challenge other provisions.²² The ACA has been constitutionally challenged several times since its inception, and consequently the Supreme Court has chosen to hear two cases in less than three years. The

¹⁷ Jay O'Donnell & Fola Akinnibi, *How Many Pages of Regulations are in the Affordable Care Act?* USA TODAY (Oct. 25, 2013), <http://www.usatoday.com/story/opinion/2013/10/23/affordable-care-act-pages-long/3174499/>.

¹⁸ Press Release, U.S. Dept. of the Treasury, Fact Sheet: Individual Shared Responsibility for Health Insurance Coverage and Minimum Essential Coverage Final Rules (Aug. 27, 2013), available at <http://www.treasury.gov/press-center/press-releases/Pages/jl2152.aspx>.

¹⁹ *Id.*

²⁰ *Id.*; see also Press Release, U.S. Dept. of the Treasury, Treasury and IRS Issue Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015, (Feb 10, 2014), available at <http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx>; see also IRS, Questions and Answers on the Individual Shared Responsibility Provision, (2015), available at <http://www.irs.gov/Affordable-Care-Act/Individuals-and-Families/Questions-and-Answers-on-the-Individual-Shared-Responsibility-Provision>.

²¹ *Nat'l Fed. of Ind. Bus. v. Sebelius*, 132 S. ct. 2566 (2012) (holding the provision of ACA requiring states to participate in exchange or lose Medicaid funding to be unconstitutional but the individual mandate requiring all citizens to obtain health insurance or pay tax constitutional because the tax is imposed by the IRS and levied on individuals through an income tax).

²² Pace, *supra* note 3, at 72.

most current case potentially invalidated federal subsidies for millions of low-income individuals who live in states without state exchanges.²³ Technical issues with the ACA Marketplace Exchange website along with delayed subsidies from administrative complications, and sequestration of small business tax credits continue to cast a dark cloud over the rollout and implementation of the ACA.²⁴ Consequently, ACA provisions such as the Individual Mandate, the Employer Mandate, and the Cadillac Tax have fueled political debate because although more Americans than ever purchased health insurance in 2014, the question remains, is the ACA cost-effective or will healthcare spending in America continue to surge?

A. *The Individual Mandate*

The Individual Mandate requires all U.S. persons not covered by an approved employer, individual plan, or federal program, such as Medicaid or Medicare to purchase a federally approved health insurance plan or face a tax. It imposes a “shared responsibility payment,” which was ruled a tax by the Supreme Court, for each month of the year any U.S. citizen, non-resident alien or their dependents fail to purchase minimum essential health coverage and do not qualify for an exemption.²⁵ Along with certain exemptions, the ACA created both healthcare tax credits and cost sharing subsidies for low to middle class individuals and families who purchase healthcare in the Marketplace Exchange.²⁶ The tax credit is meant to reduce monthly premiums for individuals and families falling within a certain federal poverty level threshold, while the subsidies reduce the cost of benefits for low-income individuals and families.²⁷ Millions of Americans were in jeopardy of

²³ See generally, *Nat'l Fed. Of Ind. Bus.*, 132 S. ct. at 2566; see also *King v. Burwell*, 759 F.3d 358, 362 (4th Cir. 2014); see also Stephanie Condon, *Supreme Court to take up Obamacare Subsidies Case*, CBS NEWS, (Nov. 7, 2014, 1:46 PM ET), <http://www.cbsnews.com/news/supreme-court-to-take-up-obamacare-subsidies-case/>.

²⁴ See Kelly Phillips Erb, *Up to 1 Million could See Delayed Refunds after Obamacare Snafu*, FORBES MAGAZINE, (Feb. 20, 2015, 11:02 AM ET), <http://www.forbes.com/sites/kellyphillipserb/2015/02/20/up-to-1-million-taxpayers-could-see-delayed-refunds-after-obamacare-snafu/>.

²⁵ 26 U.S.C. §5000A (2010).

²⁶ 26 U.S.C. §5000A(e); see also Bernadette Fernandez & Annie L. Mach, *Health Insurance Exchange Under the Patient Protection and Affordable Care Act*, Congressional Research Serv., 15-16 (Jan 31, 2013) available at <http://fas.org/sgp/crs/misc/R42663.pdf>.

²⁷ 26 U.S.C. §36B (2010) (establishing a tax credit for household or individual incomes at or above 100% but not above 400% federal poverty level and a cost sharing subsidy for enrollees in the Marketplace exchange who purchase “Silver Plans” and have a household income up to 250% of the federal poverty level); see also Fernandez, *supra* note 26 at 17.

losing these subsidies, but fortunately the Supreme Court recently ruled subsidies offered through the federal exchange to states that do not implement their own state exchanges are constitutional.²⁸

B. The Employer Mandate

Another provision, the Employer Mandate, requires certain employers to offer healthcare insurance to employees. It is not fully effective until 2016 due to administrative complications, however it generally requires any “large” company with 50 or more full-time employees to offer health insurance coverage to at least 95 percent of its employees.²⁹ The coverage must be “affordable” and provide at least “minimum coverage.”³⁰ As currently written, employer healthcare plans not meeting the Employer Mandate requirements are penalized if only one employee chooses to purchase health insurance in the Marketplace Exchange---if that employee is also eligible for a subsidy or credit offered in the Marketplace.³¹ The tax penalty charged to employers is (generally) \$2,000 per full-time employee (excluding the first 30 employees), meaning taxes are not only imposed on the employer for employees who purchase healthcare in the Marketplace Exchange, but for all deemed full-time employees once any employee (eligible for the tax subsidy) opts out of employer sponsored benefits and purchases healthcare from the Marketplace instead.³² Furthermore, employers may have to track the status of their employees and provide for payment of

²⁸ *King v. Burwell*, 576 U.S. ____ (2015) (holding that Section 36B of the ACA provides for subsidies under both federally-run and state-run exchanges).

²⁹ 26 U.S.C. 4980H (2010); *see also* ObamaCare Employer Mandate, The Employer Mandate and Penalty Delayed until 2015/2016, <http://obamacarefacts.com/obamacare-employer-mandate/>.

³⁰ 26 U.S.C. §36B(c)(2)(C)(ii) (minimum value means an employer’s share of cost must equal or exceed 60 percent total allowed costs of benefits under the plan); 26 §1302(d)(2) (value is based on actuarial value); 26 U.S.C. §36B(c)(2)(C)(i)(II) (affordable means the plan does not exceed 9.5 percent of an employee’s household income based on income from W-2s); *see also* Rev. Rul. 2014-37.

³¹ IRS, *Questions and Answers on Employers Shared Responsibility Provisions Under the Affordable Care Act*, 1-3, <http://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>.

³² *Id.* Large employer is any employer who employs on average at least 50 full-time equivalent employees during the preceding tax year. Full-time is defined as an employee who works on average at least 30 hours per week. Additionally, hours worked by part-time employees can be converted into full-time equivalents and are included when determining if a firm is a large employer by adding overall hours worked each month by part-time employee and dividing by 120. The monthly penalty assessed is equal to the number of full-time employees minus 30 multiplied by 1/12 of \$2,000 for any applicable month.

any assessable penalty on a monthly basis—a costly, administrative nightmare that also opens the door to cybersecurity risks.³³ Initially, less than two percent of American businesses are projected at risk of being taxed under the Employer Mandate, the caveat however, is that two percent represents some of America's largest corporations (and employers) therefore impacting millions of Americans.³⁴

C. The Cadillac Tax

Finally, the impetus of this Note, the “Cadillac Tax,” effective in 2018, is possibly the most burdensome ACA provision imposing a 40 percent, non-refundable excise tax on employers who offer self-funded benefits or on health insurers who offer fully-insured, high-cost health plans to employees.³⁵ This tax is levied upon insurers, employers or plan administrators of self-funded benefit plans.³⁶

The term “Cadillac Health Plan” dates back to the 1970's and was named after the American luxury car of the same name.³⁷ Cadillac health insurance plans historically offered the lowest deductibles for employees and required employers to pay high premiums because of the generous healthcare benefits that often provided low deductibles and copays, wide networks of providers, and comprehensive medical services.³⁸ Under the Cadillac Tax employee premiums exceeding an annual threshold of \$10,200 per individual and \$27,500 for family coverage are assessed on the overall aggregate cost in excess.³⁹ According to a Towers Watson analysis, almost half of large corporations in the U.S. are expected to be subject to the Cadillac Tax in 2018.⁴⁰ However, this percentage is projected to increase due to the fact the tax is tied to the Consumer Price Index (“CPI”) and because healthcare spending has consistently

³³ 26 U.S.C. §4980H(d)(1)-(2).

³⁴ Press Release, *supra* note 20 (the largest employers with 100 or more employees encompass about 2 percent of employers while employers with 50-99 employees make up an additional 2 percent of employers).

³⁵ 26 U.S.C. § 4980I; *see also* Health Affairs, *Excise Tax on ‘Cadillac’ Plans*, Vol. 34 No. 2 (Sept. 12, 2013), http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=99.

³⁶ 26 U.S.C. § 4980I(d) (applicable employer plans include any employer healthcare plan that escapes taxation under IRC §106).

³⁷ *Health Affairs*, *supra* note 35.

³⁸ *Id.*

³⁹ 26 U.S.C. 4980I (b) (C) (i).

⁴⁰ Towers Watson, *Nearly Half of U.S. Employers Expected to Hit the Cadillac Tax I 2018 with 82% Triggering the Tax by 2023*, (Sept. 26, 2014), <http://www.towerswatson.com/en/Press/2014/09/nearly-half-us-employers-to-hit-health-care-cadillac-tax-in-2018-with-82-percent-by-2023> (analysis of employers with 5,000 or more employees revealed 48 percent are likely to trigger the tax in 2018 and 82 percent by 2023 if changes are not made to health insurance options for employees).

exceeded inflation in the U.S.⁴¹ Some projections reveal that without any plan adjustments, the Cadillac Tax will impact 75 percent of all employer-sponsored plans by 2029.⁴²

1. Purpose of the Cadillac Tax

An excise tax usually serves one of two functions, either as a vehicle to raise revenue or as a behavior-changing mechanism. The Cadillac Tax is designed to accomplish three goals: (1) finance other provisions of the ACA (2) reduce healthcare costs through individual accountability, and (3) eliminate the tax loophole (ESI) that excludes health care benefits from taxable income.

Although current projections are unreliable, a recent Congressional Budget Office (“CBO”) report estimates the Cadillac Tax will result in \$120 billion extra revenue through 2024.⁴³ However, the estimate is misleading because the Cadillac Tax serves to indirectly tax individuals with employer-sponsored healthcare insurance, not merely employers as advertised. In fact, the Joint Committee on Taxation projects less than 18 percent of the revenue stream will originate from the Cadillac Tax but instead is expected to stem from payroll taxes paid by workers as a result of higher salaries paid to offset lost benefits compensation.⁴⁴ Reports suggest if companies adjust employee wages to offset reductions in health benefits in response to the Cadillac Tax, more than 12 million

⁴¹ See *Id.* (annual increases in premium thresholds triggering the tax are not based on health care cost inflation but instead are tied to the Consumer Price Index, which was 1.5 percent for 2013 – far less than medical costs and the 4 percent annual health care cost increases that employer plans are expected to experience after changes are made to plans in 2015); see also Roger Stark, *How Obamacare’s “Cadillac Tax” will affect Local Governments, Public Employees and Local Taxpayers*, WASH. POL’Y CENTER (July 2014), <http://www.washingtonpolicy.org/publications/notes/how-obamacare%E2%80%99s-%E2%80%9Ccadillac-tax%E2%80%9D-will-affect-local-governments-public-employees-and>.

⁴² See Reed Abelson, *High-End Health Plans Scale Back to Avoid ‘Cadillac’ Tax*, NY TIMES, (May 27, 2013) <http://www.nytimes.com/2013/05/28/business/cadillac-tax-health-insurance.html?pagewanted=all> (Bradley Herring, Health Economist at John Hopkins Bloomberg School of Public Health suggests the result would be more widely felt than many people realize. “The reality is that it’s going to hit more and more people over time, at least as currently written in law . . . as many as 75 percent of plans could be affected by the tax over the next decade . . . unless employers manage to significantly rein in their costs.”).

⁴³ Tevi D. Troy & Mark Wilson, *The Impact of the Health Care Excise Tax on U.S. Employees and Employers*, AM. HEALTH POL’Y INST., Executive Summary, (2014) (at least 82 percent of the revenue is projected to stem from higher payroll taxes rather than the actual Cadillac Tax).

⁴⁴ Hagan, *supra* note 11, at 258-59.

employees will face an average of \$1,050 in higher payroll and income taxes per year.⁴⁵

On the other hand, a strong argument still exists that employers will not increase employee's salaries to compensate for mediocre health insurance benefits. In fact, some argue that employers who cut benefits to avoid the Cadillac Tax will keep the savings rather than passing it along to employees in the form of higher compensation.⁴⁶ An outcome as such undermines the purpose of the Cadillac Tax because additional revenue to finance other provisions of the ACA will not be generated.

Moreover, the direct change to the treatment of ESI is projected to alter individual behavior. Excessive health insurance plans often promote wasteful spending by insured individuals who bear little cost burden. Naturally individuals without cost burdens are less likely to seek preventative care services. Hence, advocates of the Cadillac Tax argue employees covered by generous health insurance plans overuse and are shielded from the true cost of medical treatment, which in turn increases medical costs for others not insured by "Cadillac Plans."⁴⁷

Proponents of the Cadillac Tax also believe ESI promotes vertical inequity. Concerns of vertical inequity that arise from the tax treatment of ESI are a factor driving reform and elimination of ESI benefits.⁴⁸ Vertical equity principles suggest individuals with greater resources and income should pay greater percentages of taxes. The IRC exemplifies vertical equity by its system of progressive income tax brackets. ESI offers unequal tax treatment to highly compensated employees because tax-free compensation enables an individual to remain in a lower tax bracket while benefitting from the best health care plans in the market.⁴⁹ However, as currently written in the ACA, the Cadillac Tax may not remedy ESI inequities.

Critics of the excise tax argue that because premium costs do not necessarily correspond with the value of health insurance, the Cadillac Tax inequitably categorizes plans. Although Cadillac Plans are often viewed as catering to the affluent, this is not always true. Age, gender, job industry, geographic location, and size of employer affect insurance premium prices.⁵⁰ For example, a joint replacement in Ada, Oklahoma, could cost \$5,300 compared with \$223,000 in Monterey Park, California,

⁴⁵ Troy, *supra* note 43 at 5.

⁴⁶ Hagan, *supra* note 11, at 262-63.

⁴⁷ Heath Affairs, *supra* note 35.

⁴⁸ Hagan, *supra* note 11, at 260.

⁴⁹ Michael Rose, *Unions, Employers Increasingly Face ACA Excise Tax Issue in Contract Talks*, BNA, www.bna.com/unions-employers-increasingly-n17179912508/.

⁵⁰ Hagan, *supra* note 11, at 264.

a suburb of Los Angeles.⁵¹ Therefore, the Cadillac Tax disproportionately impacts individuals living in high-cost geographic regions such as the Northeast or California. In addition, higher premiums and out-of-pocket expenses are often associated with plans covering women and elderly individuals and hold no correlation to the value of the plan but rather to the demographic covered. Therefore, the Cadillac Tax is triggered prematurely for firms employing women and the elderly. This undermines the purpose of the Cadillac Tax—which is to tax excessively generous employer healthcare plans.

IV. CORPORATE EMPLOYER REACTIONS DUE TO UNCERTAINTY & COMPLEXITY OF ACA & CADILLAC TAX

Although long-term outcomes are unknown, the Cadillac Tax is likely to change employer behavior. The employer may pay the tax, alter healthcare plans to avoid the tax, or pass a portion of the tax to the employees in the form of higher premiums, co-pays and deductibles.⁵² One economist at the Massachusetts Institute of Technology went as far to say said he “[w]ould be surprised if the Internal Revenue Service even collect[s]” the Cadillac Tax.⁵³

Nothing is certain except employers are clearly concerned current healthcare plans will trigger the tax, and therefore new healthcare strategies are a priority. Companies anxious about the Cadillac Tax say it will greatly impact their healthcare strategy in 2015 and 2016,⁵⁴ and with good reason. The American Health Policy Institute found corporations subject to the tax could pay an average of \$2,700 more per year, per employee.⁵⁵ In fact, a 5.2 percent increase in healthcare costs for employees is expected in 2015 if employers make no adjustments to

⁵¹ Kelly Kennedy, *Hospitals will now be Required to tell Patients how much they Charge for Procedures*, USA TODAY, (May 9, 2013, 1:04 PM), <http://www.usatoday.com/story/news/nation/2013/05/08/hospital-transparency-report-shows-difference-in-health-costs/2144133/>.

⁵² Alex Wayne, & John Lauerma, ‘Cadillac’ Health Plans Dying Out as Federal Tax Looms, *STANDARD EXAMINER* (Jan. 10, 2015, 1:55 PM) (quoting Steve Wojcick, VP of Nat’l Bus. Group on Health, “I don’t think there’s any employer that’s planning on paying that tax.”) <http://www.standard.net/Business/2015/01/11/Lavish-Cadillac-health-plans-dying-out-as-federal-tax-looms>.

⁵³ *Id.*

⁵⁴ Towers Watson, *2014 Health Care Changes Ahead Survey Report*, (Sept. 2014) (finding that 73 percent of companies are very or somewhat concerned they will trigger the tax, and 62 percent say it will have a moderate or greater impact on their health care strategy in 2015 and 2016).

⁵⁵ Troy, *supra* note 43 at 1.

plans, putting cost per person at an all-time high.⁵⁶ Surging prices stem from the Employer Mandate, not just the Cadillac Tax, therefore employer sponsored health insurance plans will naturally become increasingly expensive.

Rational corporate business models utilize tax-planning opportunities to incur the lowest corporate tax rate possible. A 40 percent tax is inconsistent with profitable business structuring and will be legally avoided, if possible, to protect business profits. Therefore, employees should expect stingy health insurance in the future in the form of higher premiums, higher deductibles and lower employer contributions, or in some cases, a complete termination of employer-sponsored benefit plans.⁵⁷

A. Corporate Strategies Likely to Alter Fundamentals of Public and Private Unions

The Cadillac Tax is modifying corporate planning strategies and the functions of both private and public unions. Unfortunately, because of uncertain consequences, contract negotiations for both private and public sector unions are threatened by indeterminate costs of the ACA.⁵⁸ For example, in New York City the Cadillac Tax could exceed \$549 million by 2022 if employee health insurance costs are not cut.⁵⁹ City governments are warning unions the tax could result in layoffs.⁶⁰ Private sector employers also noticed increased healthcare costs in 2014 largely due to both the Employer and Individual Mandate. For example, Delta Airlines projected its healthcare costs for 2014 to increase by nearly \$100 million because of the ACA.⁶¹ A spokesperson for Delta said the increase is due to Obamacare combined with medical inflation costs. For example, Delta was charged a multi-million dollar reinsurance fee under the ACA, plus more employees purchased healthcare from the corporation because of the Individual Mandate, and adult children can

⁵⁶ Towers Watson, *Employers Expect Health Care Costs to Rise 4 percent in 2015*, (Aug. 20, 2014) (study estimates if no adjustments are made, employers expect a 5.2 percent growth rate for health care costs).

⁵⁷ Troy, *supra* note 43, at 8 (78 percent of employers are changing plans in response to high excise tax. According to Survey by Nat'l Bus. Group on Health, 42 percent are increasing employee cost sharing, 30 percent are eliminating high-cost plans).

⁵⁸ Secunda, *supra* note 5, at 100.

⁵⁹ Pace, *supra* note 3, at 76.

⁶⁰ *Id.*

⁶¹ *Id.* at 77.

now be added or kept on a parent's health insurance policy until reaching 26 years old.⁶²

Consequently, although historically supportive of the ACA, the private and public labor unions are now starkly opposed because of adverse consequences to their multi-employer healthcare plans. The ACA is likely to broadly impact multi-employer plans, some results predictable and others not. Initially, the Taft Hartley Amendments created multi-employer plans to provide not only health benefits but also pension and welfare benefits for union members who worked in industries that required employees to repeatedly change employers.⁶³ Today, union workers are directly impacted by the ACA because members conceded to lower wages in exchange for the promise of top-end health insurance benefits.⁶⁴ This promise may be broken because the Cadillac Tax and regulations within the ACA are forcing employer-based healthcare costs to increase. Historically, unions are known for negotiating the best health insurance benefits for members through Taft Hartley Collective Bargaining. Unfortunately, union negotiations may experience heightened tensions because of the ACA.

Foreseeably, some employers maintaining multi-employer benefit plans may migrate to self-insured plans in order to avoid the new taxes.⁶⁵ Why? Because if multi-employer plan participants begin breaking into smaller employer groups – some will avoid the Employer Mandate. As a result, these smaller pools will become more expensive and at some point trigger the Cadillac Tax. On the other hand, employers may instead drop healthcare benefits all together and force employees to purchase in the federal Marketplace Exchanges, again triggering the Employer Mandate penalty for large employers.

Legitimately, many companies don't know what their long-term strategy is going to be, so employers want the freedom to alter healthcare plans for employees. Therefore, employers are reluctant to join multi-employer plans because withdrawal liabilities are charged if an employer leaves the plan.⁶⁶ Moreover, collectively bargained union health benefit plans lock-in employers during the contract period, which is becoming

⁶² *Id.*; see also Avik Roy, *Delta Airlines: Next Year, our Health Care Costs will Increase by Nearly 100 Million*, FORBES (Aug. 22, 2013) <http://www.forbes.com/sites/theapothecary/2013/08/22/delta-air-lines-next-year-our-health-care-costs-will-increase-by-nearly-100-million/>.

⁶³ *Secunda*, *supra* note 5, at 101. Multi-employer plans are collectively bargained plans maintained by more than one employer, usually within the same industry, and a labor union.

⁶⁴ *Id.*

⁶⁵ See generally *Secunda*, *supra* note 5, at 98-101 (describing why multi-employer health plans may become undesirable after the ACA implementation).

⁶⁶ *Id.* at 99.

less appealing to employers because of the ACA's indefinite costs and penalties. Collectively-bargained health insurance plans relied on by more than 15 million union workers under the Taft Hartley Act are now in jeopardy when union contracts become due for renegotiation.⁶⁷ Union leaders anticipate problems negotiating with employers during the next cycle of contract renegotiations due to the Cadillac Tax and Employer Mandate because neither the unions nor the employer want to bear the burden of the tax, therefore, contract negotiations may come to a standstill.

For example, nearly twenty thousand union members of the International Longshore and Warehouse Union at the U.S. commercial ports on the west coast recently threatened to strike after their union contract expired.⁶⁸ These ports handle 70 percent of maritime imports from Asia; therefore a strike is not only detrimental to the U.S. economy—but would effectively shut down the ports.⁶⁹ In 2002 when west coast port employees threatened to strike and ports were briefly shutdown, the cost to the U.S. economy was nearly \$1 billion per day.⁷⁰ The Longshoremen's Union contract expired in July 2014, and a tentative contract agreement was not ratified until May 25, 2015. "The negotiations for this contract were some of the longest and most difficult in our recent history," said ILWU International President Robert McEllrath.⁷¹ Contract talks stalled largely due to debate of whether the union or employers will pay the Cadillac Tax in 2018.⁷² Health benefits of the Longshore Union members exceed forty-thousand dollars per person, so a hefty penalty would be imposed under the Cadillac Tax.⁷³ The Longshoremen are the first union to negotiate a contract extending beyond the time the Cadillac Tax is first imposed, signifying the possibility of a recurring problem for unionized industries when

⁶⁷ Patricia Murphy, *Obama's Labor Pains: Unions Rage Against the Affordable Care Act*, The Daily Beast (Sept. 20, 2013) www.thedailybeast.com/articles/2013/09/20/obama-s-labor-pains-unions-rage-against-the-affordable-care-act.html.

⁶⁸ Chriss W. Street, *Longshoremen Union to Strike 29 West Coast Ports*, BREITBART (Feb. 6, 2015) <http://www.breitbart.com/california/2015/02/06/longshoremen-union-to-strike-29-west-coast-ports/>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ International Longshore and Warehouse Union, *Longshore Members Overwhelming Ratify New Contract by 82%*, (May 25, 2015) <http://www.ilwu.org/longshore-members-overwhelming-ratify-new-contract-by-82/>.

⁷² Mike Flynn, *Obamacare Tax Threatens to Close West Coast Ports*, BREITBART (Feb. 10, 2015) <http://www.breitbart.com/big-government/2015/02/10/obamacare-tax-threatens-to-close-west-coast-ports/>.

⁷³ *Id.*

contracts begin to expire in the coming years.⁷⁴ “This will come up in just about every contract negotiation out there . . . [e]very employer is going to be calculating when and if they hit the threshold and how they’re going to pay for this.”⁷⁵

V. ARE THE EMPLOYER MANDATE & CADILLAC TAX CAUSING NATIONAL SECURITY RISKS?

A. Department of Defense (DOD) Contracts

The health of our nation includes not only physical health but also the economic well-being and safety of U.S. citizens. Today, the majority of DOD contracts lie with only a few, large corporations mostly due to corporations merging to increase sales and counter the diminution in U.S. weapon spending.⁷⁶ A few of the top corporations include Lockheed Martin, Boeing, and General Dynamics.⁷⁷ Because these corporations rely heavily on DOD contracts, it is imperative government contracts are awarded to ensure future viability.

1. Lockheed Martin

Lockheed Martin employs over 115,000 employees worldwide, 95 percent are located in the United States.⁷⁸ Over 82 percent of Lockheed Martin’s net annual sales derive from the U.S. government, 61 percent being from the DOD alone.⁷⁹ Lockheed Martin is the top government-contracting corporation responsible for research and development necessary to protect the U.S. military service men and women.

The defense corporation developed the F-16 Fighter Jet and is currently developing the F-35, the successor to the F-16. Approximately 15 percent of Lockheed Martin employees are covered by one of sixty

⁷⁴ *Id.*

⁷⁵ *Id.* (quoting Bloomberg News interview with J.D. Piro, health-benefits analyst).

⁷⁶ James F. Peltz, *Lockheed Will Buy Loral Corp. for \$9 Billion*, LA TIMES (Jan. 9, 1996) http://articles.latimes.com/1996-01-09/news/mn-22623_1_lockheed-martin-s-chief.

⁷⁷ The 10 Biggest U.S. Government Contractors, MSNBC, <http://www.cnbc.com/id/42494839/page/2> (reporting the ten biggest U.S. government contractors are: Lockheed Martin, Boeing, General Dynamics, Raytheon, United Technologies, SAIC Inc., L-3 Communications, BAE Systems, Oshkosh Corp, McKesson Corp).

⁷⁸ Lockheed Martin Corp, Ann. Rep. (Form 10-K) at 8 (Dec. 31, 2013), *available at* <http://lockheedmartin.com/content/dam/lockheed/data/corporate/documents/2013-Annual-Report.pdf>.

⁷⁹ *Id.*

collective bargaining agreements with various unions across the country.⁸⁰

2. Boeing

Boeing is a leading researcher, developer, and producer of military aircraft and weapon systems with approximately 67 percent of its revenue derived from the DOD.⁸¹ Boeing's Defense, Space and Security ("BDS") segment is engaged in research, development, and production of manned and unmanned military aircraft and weapon systems for global strike, including fighter aircraft and missile systems, rotorcraft and tilt-rotor aircraft, unmanned airborne systems, and tanker aircraft.⁸² In addition, Boeing's Network & Space Segment engages in research and development of electronics, computers, intelligence and surveillance systems, strategic missile defense systems, and space intelligence and satellite systems.⁸³ In 2013 Boeing successfully negotiated contracts with the U.S. government to develop the V-22 Osprey tilt-rotor aircraft for the U.S. Marine Corps and U.S. Air Force and the CH-47F Chinook helicopters for the U.S. Army. In addition, it contracted to produce the P-8A Poseidon for the U.S. Navy and to develop GPS modernization for the U.S. Air Force.⁸⁴ In 2014 Boeing focused their Defense, Space & Security priorities on both the development of the KC-46A Tanker and on international expansion.⁸⁵ Boeing employs approximately 168,400 employees, with 38 percent (65,000) of its employees being represented by The International Association of Machinists and Aerospace Workers, The Society of Professional Engineering Employees in Aerospace, or the United Automobile, Aerospace and Agricultural Implement Workers of America.⁸⁶

⁸⁰ *Id.* at 9.

⁸¹ The Boeing Company, Ann. Rep. (Form 10-K), at 13 (Dec. 31, 2013), *available at* http://www.boeing.com/assets/pdf/companyoffices/financial/finreports/annual/2014/annual_report.pdf.

⁸² *Id.*

⁸³ *Id.* at 14.

⁸⁴ *Id.* at 5 (Boeing Defense Space and Security business comprises of three segments: Boeing Military Aircraft, Network and Space Systems, and Global Services & Support).

⁸⁵ *Id.* at 6 (statement by Jim McNerney, Chairman and Chief Executive Officer)

⁸⁶ *Id.* at 16 (the percentage of Boeing's employees represented by unions and membership agreement expiration dates include: IAM 21% (two major agreements one expiring in 2015 one in 2024), SPEEA 14% (one agreement expiring 2016), UAW 2% (one major agreement expiring in 2015)).

3. General Dynamics

General Dynamics (“GD”) is an aerospace and defense corporation that offers a broad portfolio of combat vehicles, weapons systems and communication and technology systems.⁸⁷ Its Combat Systems group is a leader in systems engineering, design, development, and manufacture of wheeled combat and tactical vehicles, battle tanks, munitions, and armaments, axle and drivetrain components and support and sustainment services. Approximately 62 percent of its annual revenue stems from U.S. DOD contracts.⁸⁸ GD consistently develops vehicles fundamental to military war fighting capabilities such as the Stryker Wheeled Combat Vehicle, which has improved solider protection from IEDs, the Abrams Main Battle Tank that has recently been enhanced with a digital platform, thermal sights and improved armor, and the Buffalo Route Clearance Vehicle. GD contracts to refurbish and maintain all damaged vehicles and must consistently upgrade and modernize its military vehicles to ensure that the most technologically advanced equipment protects the U.S. Military.⁸⁹ In addition, GD’s information and technology group develops command-and-control systems for the U.S. DOD, intelligence and federal and civilian safety agencies to protect from homeland terrorist threats.⁹⁰ Most notably, GD developed the Warfighter Information Network Tactical which is a Mobile Battlefield Communications Network widely used by the U.S. Military.⁹¹ GD employs over 96,000 employees, 20 percent being affiliated with a union in the United States.⁹²

Lockheed Martin, Boeing, and GD have each separately commented that the ACA, specifically the Cadillac Tax, will adversely impact business and employees. For example, representatives of Lockheed Martin stated although the Cadillac Tax is “[t]he most distant . . . it is the most significant.”⁹³ “Lockheed could pay millions in ‘Cadillac Taxes’ . . . if healthcare changes [a]re not made to avoid the excise

⁸⁷ General Dynamics, Ann. Rep. (Form10-K) at 3 (Dec. 31, 2013), available at <http://investorrelations.gd.com/phoenix.zhtml?c=85778&p=irol-reportsannual>.

⁸⁸ *Id.* at 4, 10.

⁸⁹ *Id.* at 3.

⁹⁰ *Id.* at 6

⁹¹ *Id.*

⁹² *Id.* at 6.

⁹³ Lockheed Martin, *Who We Are*, <http://www.lockheedmartin.com/us/who-we-are/negotiations/competitive-benefits.html> (“Lockheed Martin could pay millions in ‘Cadillac Taxes’ starting in 2018 if plan changes are not made to avoid the excise tax. Most employers are taking steps now to avoid the excise tax in 2018 and beyond.”).

tax.”⁹⁴ Therefore, defense contractors should be cautious and remain informed of widespread implications of the ACA.

B. Defense Budget Cuts

Defense spending cuts in conjunction with the ACA and costs of the Cadillac Tax will potentially impact the military weapon industry, disrupt ongoing programs, impact supply chains, cause contractual terminations, facility closures, and cause personnel reductions—all of which impede new research, manufacturing and engineering.⁹⁵ Noted above, employers' response to the ACA is undetermined because the Act has yet to be completely implemented. However, U.S. military and defense spending has already suffered budget cuts due mostly to the U.S. fiscal shortfall. The Budget Control Act of 2011 mandated \$487 billion, or an 8 percent reduction to defense funding over a ten-year period.⁹⁶ A sequester-level budget would alone result in a military too small to meet strategy requirements and thereby increase both long and short-term national security concerns.⁹⁷ Mike McCord, the DOD Comptroller reiterated that sequestration also delays the reset of service equipment returning from Afghanistan and reduces the amount the military can invest in acquisition, research and development projects. Defense budget cuts pose significant threats considering current conflicts with global terrorist groups such as ISIS—especially because the U.S. Military is not only responsible for defending America, but is also committed to protecting human rights in countries around the world.⁹⁸ In addition, multi-year sequestration hinders development of Boeing's KC-10 tanker, Lockheed Martin's F-35 and GD's Stryker double-v hull, three critical

⁹⁴ *Id.*

⁹⁵ Lockheed Martin, *supra* note 78 at 9.

⁹⁶ David Adenknik, *A Strong Defense is No Luxury*, US NEWS, (Feb. 27, 2015) <http://www.usnews.com/opinion/blogs/world-report/2015/02/27/budget-control-act-sequestration-defense-cuts-must-be-reversed> (although the fiscal year 2015 received a partial reprieve, impacts of sequestration remain a future threat. In addition, a threat of sequestration imposes additional defense cuts up to \$500 billion over nine years beginning fiscal year 2013).

⁹⁷ U. S. Dept. of Defense, *DOD Releases Report on Estimated Sequestration Impact*, <http://www.defense.gov/news/newsarticle.aspx?id=122065> (quoting Defense Secretary Chuck Hagel, “under the sequester-level budgets, we would be gambling that our military will not be required to respond to multiple major contingencies at the same time.”) (according to the Department of Defense report on the estimated impacts of sequestration level defense budget cuts, over 50 percent of reduction relates to combat systems, systems development and munitions).

⁹⁸ Kris Osborn, *Pentagon: Sequestration would again Reduce Annual Military Training*, MILITARY.COM NEWS (Feb. 19, 2015), <http://www.military.com/daily-news/2015/02/19/pentagon-sequestration-would-again-reduce-annual-military-train.html>.

pieces of combat equipment critical for U.S. defense capabilities and readiness.⁹⁹

i. Corporate Initiatives to Remain Competitive

In light of budget cuts and the ACA, corporations must still remain fiscally responsible. The Board of Directors of a corporation owes a legal, fiduciary duty to act in the best interest of the corporation and its shareholders. Therefore, corporations must make necessary adjustments to their business models to adhere to economic changes and to remain competitive.

a. Cost Reduction

In response to defense budget cuts, corporations such as Lockheed Martin, Boeing, and GD are forced to implement cost reduction initiatives since most revenue is derived from DOD contracts. If domestic corporations lose government contracts because of budget cuts, especially contracts for large military weapon projects, thousands of American jobs are at risk. For example, in 2013 GD reduced its U.S. and European military vehicles businesses and cut 25 percent of its employees.¹⁰⁰

b. Business Consolidation & Facility Closures

Lockheed Martin has also consolidated its business facilities in response to budget cuts. One facility set to close is the Mission Systems and Training Center in Akron, Ohio. The facility is mainly used for flight simulators but also is responsible for missile work guidance systems, and for testing sensing devices for the military. Louis Elliott, who worked as a Senior Quality Assurance Engineer at the Akron facility for 21 years before retiring, offered a firsthand account of the operational complexity at Lockheed's development and manufacturing sites.¹⁰¹ "At least 20 percent of salaried employees were required to obtain security clearances."¹⁰² Mr. Elliott also commented that although there was not a heavy union presence at the Akron facility when he retired, the union did strike in 1989 before Lockheed Martin acquired the facility from Loral Corporation (which originally bought the facility from Goodyear

⁹⁹ *Id.*

¹⁰⁰ General Dynamics, *supra* note 87, at 21.

¹⁰¹ Telephone Interview with Louis Elliott, Retired Senior Quality Assurance Engineer & Certified NDT Level III, authorized by the corporations to train, test and certify selected salary and union personnel, Lockheed Martin Corp, Loral Corporation, Goodyear Aerospace (Feb. 15, 2015).

¹⁰² *Id.*

Aerospace), and it caused significant delays in production. "Strikes were tough on me because I was responsible for certifying Quality personnel to perform required nondestructive test examinations, which required a certain proficiency with the equipment."¹⁰³ When unions would strike, the nonunion, salaried employees were put on the floor doing the work of the union workers—working fourteen to eighteen hours a day. "This caused a hindrance on the entire system. We (the salaried employees) tried to keep it moving, but delivery dates were definitely slowed."¹⁰⁴

c. Cutting Benefits Packages

Lockheed Martin representatives have also stated that, due to defense budget cuts and tighter cost controls on military contractors, the corporation is interested in lowering its healthcare costs over time.¹⁰⁵ U.S. Defense budget cuts further persuade corporations such as Lockheed Martin, Boeing, GD, and other large firms contracting with the DOD to either avoid the Cadillac Tax or shift the cost burden to their employees in efforts to sustain profits with dwindling budgets.¹⁰⁶ For example, in 2010 Boeing asked non-union workers to pay significantly more for healthcare insurance by raising deductibles and co-payments.¹⁰⁷ Out-of-control healthcare costs have caused Boeing problems competing with other manufacturers—especially one of its biggest competitors, Airbus, which is incorporated in Europe where the governments shoulder much of the healthcare costs.¹⁰⁸ If Lockheed Martin, Boeing, or GD choose to terminate employee healthcare benefits (which is unlikely) or alternatively offer mediocre benefit packages at higher costs to employees—corporations responsible for supporting U.S. national security will experience difficulty attracting and retaining the most competent engineers and skilled workers.¹⁰⁹ Without talented employees, defense corporations lose competitive edge, which eventually could cause the U.S. to forfeit its reputation as being the largest exporter of weapons to foreign allies. For example, Egypt recently purchased fighter

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Christopher Drew, *Lockheed Martin is Replacing Strikers at Fighter Plane Plant*, NY TIMES, (Jun. 15, 2012) http://www.nytimes.com/2012/06/16/business/lockheed-is-replacing-strikers-at-f-35-plant-in-texas.html?_r=1&.

¹⁰⁶ Ricardo Zaldivar –Alonso, *Boeing Blames Obamacare for 'Cost Pressures' in Its Health Plan*, CNS NEWS (Oct. 19, 2010, 7:42 AM) <http://cnsnews.com/news/article/boeing-blames-obamacare-cost-pressures-its-health-plan>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See generally Lockheed, *supra* note 78, at 17; see generally Boeing, *supra* note 81, at 15; see generally General Dynamics, *supra* note 87, at 13.

jets from France, a weapons sale that used to exclusively belong to the U.S.¹¹⁰

C. Advanced Weapon Design and Testing cannot be Completed Overnight

Research and domestic production are critical because of the complexity and project timelines required to produce advanced military weapons systems. “Timing is key because timing is money . . . a corporation cannot make money if it’s delayed by bureaucracy.”¹¹¹ Lockheed Martin’s F-35 was designed in the 1990’s, contracted in 2001, but testing did not even begin for another ten years.¹¹² The time frame from inception to use could be as long as twenty years. Its predecessor, the F-16, was jointly developed and produced by Lockheed Martin and GD beginning in 1974 and was not delivered for Air Force use until ten years later.¹¹³ The F-35 has been criticized as the Pentagon’s most expensive piece of equipment as undeniably billions have been spent on research, production, manufacturing and testing. However, what price is too high to protect America and the men and women who voluntarily join the military to protect our freedom? The F-16 was developed nearly thirty years before the Internet and is completely inadequate because of technological advancements. For example, the F-35 is basically undetectable due to its advanced electronic warfare capabilities.¹¹⁴ It reduces detection by enemy aircraft and defense systems and provides “invisibility” that the F-16 cannot achieve.¹¹⁵ Without a doubt, aging weapon systems must be replaced with advanced, high-tech weapons, or the U.S. is left vulnerable to nuclear, biological and chemical warfare.

D. Collective Bargaining Issues & National Security

Collectively, over one hundred thousand individuals employed with Lockheed Martin, Boeing and GD are members of a union, therefore,

¹¹⁰ Noah Rayman, *The Real Reason Egypt is buying Fighter Jets from France: It has nothing to do with France and everything to do with the United States*, TIME (Feb. 14, 2015) <http://time.com/3710118/egypt-rafale-fighter-jet-france/>.

¹¹¹ Elliott, *supra* note 101.

¹¹² Neal Cohan, *The F-35 Fighter Jet: The Cost and the Controversy*, NPR, (Jan. 03, 2013, 1:00 PM ET), <http://www.npr.org/2013/01/03/168549286/the-f-35-fighter-jet-the-cost-and-controversy>.

¹¹³ Liberty References, *History of the F-16*, <http://www.libertyreferences.com/f-16-history.shtml>.

¹¹⁴ Allison Barrie, *5th Generation F-35 Stealth Fighter Makes Headway*, FOX NEWS (May, 03, 2013), <http://www.foxnews.com/tech/2013/05/02/5th-generation-f-35-stealth-fighter-makes-headway/#.VOye9mS9Wco.email>.

¹¹⁵ *Id.*

turmoil during collective contracting negotiations is expected because of the uncertainty of the ACA's cost and taxes to employers and unions.¹¹⁶ As previously discussed, to avoid paying the Cadillac Tax, corporate employers can shift the burden of the excise tax to employees through avenues such as higher deductibles and copays and higher employee contributions.¹¹⁷ Such shifts instigate an immediate tension between corporations and labor unions. Unless corporations agree to pay higher wages to union members to compensate for less comprehensive health insurance benefits, or on the other hand, unions agree to pay the Cadillac Tax penalty, it is possible unions will threaten to strike when it comes time for new collective bargaining agreements negotiations.

1. The National Labor Relations Act Provides a Federal Right to Strike

a. Emergency Injunctions

Union strikes are a possible unintended consequence of the Cadillac Tax, but can potentially delay or cease production of critical military equipment and technology. Strikes will largely depend upon the President's utilization of an Emergency Injunction to enjoin union strikes.¹¹⁸ Although the National Labor Relations Act ("NLRA") provides a federal right to strike, Taft Hartley Emergency Injunctions afford the President the power to enjoin a strike under limited circumstances.¹¹⁹ Employees governed by the NLRA are subject to these injunctions if a strike affects an entire industry and "imperils national health or safety."¹²⁰

A President has invoked a Taft Hartley Emergency Injunction thirty-five times in history, the most recent time being in 2002 when the west coast port closed due to a lockout.¹²¹ In 2002, Secretary of Defense Donald Rumsfeld argued the lockout impeded national security because the ports were necessary to import and export essential military supplies crucial to support the armed forces during a war on terrorism.¹²² Rumsfeld's argument was sufficient to persuade the district court that national security was compromised, and therefore the ports were required

¹¹⁶ Street, *supra* note 68.

¹¹⁷ *Id.*

¹¹⁸ Jared S. Gross, *Yet Another Reappraisal of the Taft Hartley Act Emergency Injunctions*, 7 U. PA. J. LAB. & EMPL. L. 305, 311-312 (2005).

¹¹⁹ 29 U.S.C. §178; *see also Id.* at 325.

¹²⁰ 29 U.S.C. §141 (1947); *see also* 29 U.S.C. §178; *see also* Gross, *supra* note 118, at 308-309.

¹²¹ Gross, *supra* note 118, at 311-312.

¹²² *Id.* at 317.

to reopen.¹²³ In addition, the court enjoined the union from striking. The port closure was the first time “national safety” was interpreted under the permanent injunction.¹²⁴ Because of the court’s holding, an inference is drawn that military supplies are so critical during wartime that any work stoppage gravely impairs and risks national security.¹²⁵

Therefore, it is probable the President could successfully seek an emergency injunction if national safety is imperiled. Although union members working for Lockheed Martin, Boeing and GD have not yet been faced with such a dispute, a similar result is likely since these corporations are responsible for a large portion of all military weapon research, building and production in the U.S. However, it should also be noted that President Obama did not invoke such an injunction during the Longshoremen’s most recent threat to strike even after members of Congress asked the Whitehouse to help resolve the issue.¹²⁶ Instead, during a Presidential conference, the President said both sides could reach a deal “through the time-tested process of collective bargaining.”¹²⁷

A constitutional issue can be raised because the dockworkers were denied a right to strike without any law being passed when President Bush invoked the Taft Hartley Emergency Injunction.¹²⁸ Some argue this undermines Congress’s intentions written into law under the Taft Hartley Act—arguably degrading the system of checks and balances built into the Constitution, which prevents one branch from exceeding its limited powers. The unions therefore view emergency injunctions as one-sided relief in favor of the government.¹²⁹ Overturning an employee’s right to strike “puts the workers at the mercy of their employers.”¹³⁰ The right to strike builds upon foundational U.S. rights of our country such as a democratic government and freedom. Without proposing an alternative method to combat an employer’s power, union members’ rights are stricken.¹³¹

Arguably, since emergency injunctions should only be exercised in dire situations, the President does not always invoke his power to seek injunctive relief, so consequently union strikes are not unrealistic. Historically, union strikes have lasted anywhere from six hours to ten

¹²³ *Id.*

¹²⁴ *See* 29 U.S.C. 178 (a) (i)-(ii) (1947).

¹²⁵ *See generally Id.*

¹²⁶ Street, *supra* note 68.

¹²⁷ *Id.*

¹²⁸ Gross, *supra* note 118, at 306.

¹²⁹ *Id.* at 320-21.

¹³⁰ *Id.* at 305.

¹³¹ *Id.* at 328 (standing for the proposition strict scrutiny should be applied and the law should be narrowly tailored when analyzing whether to enjoin a union strike because rights of unions workers are encroached).

years.¹³² In 2012, Lockheed Martin replaced striking union members at its Fighter Plane Plant in Fort Worth, Texas with temporary workers.¹³³ Over 3,300 union workers went on strike over proposed changes to health benefits at the plant, which builds F-35 strike fighter aircraft and F-16 models for foreign U.S. allies.¹³⁴ A spokesperson for Lockheed Martin said the company was using an employment agency to find contractors who had some experience in aerospace plants.¹³⁵ Hiring contractors to replace union workers poses three problems. First, hiring outside contractors at a more expensive rate drives up the cost to tax payers. The Pentagon projected spending \$400 billion over 25 years on the F-35, the most expensive defense project to date. Therefore, additional money should not be wasted to employ more expensive, outside contractors. Second, union workers are trained to develop weapons while outside contractors receive merely a short crash course. The difference in expertise and a steep learning curve wastes time, money and increases likelihood of technical problems in development due to the lack of working knowledge and familiarity with the machines.¹³⁶ Most importantly, hiring contractors to replace union workers increases security risks. Many employees working on military equipment must acquire security clearances. High employee turnover creates more possibilities for security breaches simply because more people are exposed to sensitive information.¹³⁷

Overall, defense contractors who are union members should be cognizant that collective bargaining powers are diminished by the emergency injunction because corporations have less incentive to bargain since the government has the right to intervene. Ultimately, collective bargaining agreements between the employers and unions could be nearly impossible to negotiate.¹³⁸

E. Globalization Initiatives

Finally, annual reports of Lockheed Martin, Boeing, and GD all indicate globalization initiatives, which could signify a threat to relocate

¹³² Christopher Matthews, *The 'World's Longest Labor Strike' Ends in a Whimper*, TIME (May 31, 2013), <http://business.time.com/2013/05/31/the-worlds-longest-labor-strike-ends-in-a-whimper/>.

¹³³ Drew, *supra* note 105.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See generally Lockheed, *supra* note 78, at 9.

¹³⁸ See generally Angela Marie Hubbell, *Labor: 4 Broad Implications the ACA Could Have for Collective Bargaining*, Inside Counsel, (Feb.11 2013) <http://www.insidecounsel.com/2013/02/11/labor-4-broad-implications-the-aca-could-have-for>.

operations or facilities abroad. Alternatively, it may simply suggest the corporations are planning to increase international sales to offset declining U.S. spending. The Vice President of Deloitte Touche's Global Aerospace and Defense Division stated, [his firm] "anticipate[s] that U.S. defense contractors will aggressively address this revenue shortfall with foreign military sales, acquisitions, new product introductions and growth in adjacent markets."¹³⁹

The DOD budget cuts curtailed research, manufacturing, and production of integral military technology and equipment needed for the U.S. to remain a competitor in the global market and for the necessary protection of U.S. citizens. Furthermore, Lockheed Martin, Boeing, and GD are uneasy the ACA and Cadillac Tax might exacerbate budget cuts the corporations are already facing.

U.S. defense corporations are crucial not only for the economy but also for national safety and security. Losing large-scale acquisition contracts hinders a defense company's ability to compete domestically and abroad because shrinking revenue and profits lead to less research, development, and hiring, which in turns causes the corporations to lose competitive edge.¹⁴⁰ In addition, it is more secure for U.S. government defense contracts to be awarded to companies owned and operated within the U.S. rather than foreign entities, even if that foreign country is an ally¹⁴¹ because of the highly sensitive information and technology constantly exchanged.¹⁴²

Foreign governments, especially in Europe, provide subsidies to help domestic companies launch new products.¹⁴³ These subsidies give foreign entities a competitive bidding edge because foreign corporations are able to bid at lower rates than non-subsidized, U.S. domestic corporations. For example, Airbus, Boeing's biggest competitor, is a French entity and receives subsidies for designing new aircraft.¹⁴⁴ Boeing contends the subsidies are largely to blame for Airbus's success

¹³⁹ See Lockheed Martin, *supra* note 78, at 6; Boeing, *supra* note 81, at 8; General Dynamics *supra* note 87, at 11; see also Mohana Ravindranath, *Top Defense Continuing to See 2.5% Decline in Revenue*, Wash. Post, (May 4, 2014) http://www.washingtonpost.com/business/capitalbusiness/top-defense-contractors-see-25-percent-decline-in-revenue/2014/05/02/136c436a-cef1-11e3-a6b1-45c4dfb85a6_story.html.

¹⁴⁰ See Lindsay McCarl, *Foreign Competition in The U.S. Defense Contracts: Why the U.S. Government Should Favor Domestic Companies in Awarding Major Defense Procurement and Acquisition Contracts*, 24 Pac. McGeorge GLOBAL BIZ. & DEV. L.J. 303, 325 (2011).

¹⁴¹ See *Id.* at 328.

¹⁴² *Id.* at 325.

¹⁴³ *Id.* at 334-35.

¹⁴⁴ *Id.*

dominating the global and domestic civilian aircraft industry and is also why Boeing was forced to lay-off American workers.¹⁴⁵

The possibility of a U.S. corporation moving its headquarters abroad should motivate the U.S. government to sufficiently fund defense corporations and also incentivize the government to ensure these employers are not overly burdened by the ACA. An example is BAE Systems, which is headquartered in the UK. After the UK awarded defense contracts to foreign countries, BAE Systems threatened to move its headquarters to the U.S., which would destroy the UK's defense industrial base.¹⁴⁶ Lockheed, Boeing and GD have not threatened to move headquarters abroad, however if any of the three relocated, devastating results for U.S. taxable income and also American jobs is guaranteed.

National security concerns have become an increasing concern. Therefore, it is vital that government defense contracts are awarded to companies owned and operated within the U.S. rather than foreign entities. It is crucial for military production and manufacturing to rest safely in the U.S.

VI. ENDING IT OR MENDING IT: POSSIBLE SOLUTIONS TO ELIMINATE THE COMPLEXITIES OF THE ACA

Repeal of the ACA is not a feasible option because it is already woven into the life of people, families, and businesses. Millions of U.S. citizens are currently enrolled in the Marketplace Exchange and employers have already taken steps in preparation for both the Employer Mandate and the Cadillac Tax. Therefore, repeal entangles an already convoluted system of healthcare reform. Furthermore, some regulations in the ACA have positively impacted the healthcare system in America—so complete repeal is unnecessary. For example, in 2014 more individuals than ever were covered by health insurance.¹⁴⁷ In addition, the fact that U.S. citizens are no longer denied health insurance because of pre-existing conditions is a monumental development for the U.S. healthcare system.

One of the biggest flaws of the ACA, however, is its complexity, which some argue was intended—as Jonathan Gruber stated, “[The ACA is] exploitation of the lack of economic understanding of the American

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 336-37.

¹⁴⁷ Lindsey Cook, *Percentage of Uninsured Americans Now Lowest on Record*, USNEWS.COM (Jul. 10, 2014, 4:29 EDT) <http://www.usnews.com/news/blogs/datamine/2014/07/10/percentage-of-uninsured-americans-now-lowest-on-record>.

voter.”¹⁴⁸ On the other hand, maybe it was the Administration’s best effort to reform a flawed, expensive, and inefficient healthcare system.

However, it is not too late to simplify the ACA to assure administrative ease for corporations and more equitable and cost effective solutions for Americans. The first step might be to repeal the Cadillac Tax. The government can alternatively achieve some of its goals by either repealing IRC § 106, or by utilizing an employer sponsored healthcare system where the employee and employer equally share healthcare costs. For example, in Germany, employees purchase insurance from employers and contribute to a “sickness insurance fund,” which is based on an individual’s income.¹⁴⁹ The employer and the employee contribute, therefore both the employer and the employee bear some burden and accountability.¹⁵⁰ Germany’s healthcare system operates under a similar but more simplified model of the ACA and utilizes a government regulated (but public), non-profit healthcare system.¹⁵¹ For example, although it is illegal to be uninsured in Germany, there is no monetary penalty because individuals are automatically enrolled in the compulsory healthcare system.¹⁵² In addition, individuals earning more than about \$50,000 USD per year can opt for private health insurance priced according to risk-related contributions.¹⁵³ This is beneficial for young, healthy individuals but tends to become more expensive as individuals age.

Germany is not the only European model the U.S. should take note from to improve healthcare policies, but it is the world’s oldest national health insurance model.¹⁵⁴ Prices for procedures in Germany are lower and more uniform than in the U.S. because doctors’ associations negotiate fees directly with all of the “sickness funds” in each state.¹⁵⁵ Additionally, individuals are offered discounted rates from insurers for participating in preventative care procedures, the rational being healthier

¹⁴⁸ S.E. Cup, *The Guy Who Thinks Voters are ‘Stupid,’* CNN (Nov. 15, 2014, 4:29 PM ET), <http://www.cnn.com/2014/11/13/opinion/cupp-gruber-obamacare/index.html>.

¹⁴⁹ Germany Health Insurance System, *German Health Care System – An Overview*, <http://www.germanyhis.com/>.

¹⁵⁰ *Id.* (stating 15.5 percent of an individual’s income is allocated to healthcare fees under the compulsory health care system with the employee contributing 8.2 percent and the employer contributing 7.3 percent).

¹⁵¹ Int’l Health Systems, Germany, PNHP http://www.pnhp.org/facts/international_health_systems.php?page=all (noting Germany has higher life expectancy, much lower obesity rates, more physicians per person and better quality of health care than the U.S.).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Int’l Health Systems, Germany, *supra* note 151.

individuals result in lower future expenses for insurance companies.¹⁵⁶ As previously mentioned, higher compensated employees contribute more to health care than lower paid employees to mitigate health insurance costs. Some corporations in America that provide health insurance to employees have utilized the same structure.¹⁵⁷ Germany's system is not perfect and there are issues with cost efficiency, however, it is simplistic, yet efficient—unlike the ACA.

As time progresses, it is clear that employers required to provide health benefits under the Employer Mandate will also trigger the Cadillac Tax if the ACA is not amended and if healthcare price control mechanisms are not implemented. Most developed countries allow the government to regulate medical costs to some extent, a policy the U.S. should consider. A recent study found that U.S. pharmaceutical companies overstate their costs of research and development and that the actual cost was only 5 percent of the industry quote – yet the U.S. still does not regulate pharmaceutical prices.¹⁵⁸ Policies attempting to regulate the pharmaceutical industry must however be balanced against the need for drug innovations for the prosperity of future generations. Similarly, hospital charges are not regulated so price variances are staggering, and therefore also drive-up healthcare costs for Americans. Studies reveal most health insurance companies' profits are small (about 3.2 percent) versus the net profit margin of 16.67 percent for the healthcare sector as a whole.¹⁵⁹ Clearly, reforming only health insurance without also addressing other cost control mechanisms is an ineffective approach and merely masks other problems with the U.S. healthcare system.

Between 2008 and 2013, the average employee contributions to health insurance plan premiums increased by 38.6 percent while the average income of employees only increased by 8.8 percent.¹⁶⁰ Clearly,

¹⁵⁶ German Health Insurance System, *supra* note 149.

¹⁵⁷ Kaiser Family Foundation and Health Research & Educational Trust, *Employer Health Benefits* (Ann. Surv.) (2014) <http://files.kff.org/attachment/2014-employer-health-benefits-survey-full-report> (finding that 10 percent of large employers have plans where lower-wage employees contribute a lower percentage of the premium than higher-wage employees).

¹⁵⁸ Matthew Herper, *The Cost of Creating a New Drug Now \$5 Billion, Pushing Big Pharma to Change*, FORBES (Aug. 11, 2013) <http://www.forbes.com/sites/matthewherper/2013/08/11/how-the-staggering-cost-of-inventing-new-drugs-is-shaping-the-future-of-medicine/2/>.

¹⁵⁹ Healthcare Sector – Industry List, BIZ YAHOO.COM http://biz.yahoo.com/p/5qpm.html;_ylt=AwrT6V2l13RVpsoAhXAnnllQ;_ylu=X3oDMTByb2lvbXVubGNvbG8DZ3ExBHBvcwMxBHZAaWQDBHNlYwNzcg--.

¹⁶⁰ *Id.* at 120 (finding that from 2006 to 2014, the percentage of employees in employer sponsored health care plans with deductibles increased from 55 percent to 80 percent).

health insurance costs are marching upward at an unsustainable rate—a rate not even manageable by the ACA. In fact, a New York Times and CBS News Poll found 46 percent of Americans said affordability of medical care was a hardship, which is an increase from 36 percent who said the same in 2013.¹⁶¹ In addition, a recent Kaiser Family Foundation Poll found 24 percent of uninsured individuals remain uninsured because of the inability to afford a healthcare plan on the Marketplace Exchange.¹⁶²

The ACA has expanded healthcare coverage to more Americans, but it has not addressed much-needed cost controls.¹⁶³ Taxing and penalizing individuals and corporations is not the proper method to achieve cost control. Alternatively, the government should work with the medical industry to deliver reasonably-priced services across the board by eliminating wasteful practices and unnecessary administrative expenses. “There are only two options regarding commitment. You’re either in or you’re out. There is no such thing as life in between.”¹⁶⁴ The government has already regulated health insurance, and there is no turning back; the entire healthcare industry now must follow suit to truly reform America’s healthcare system.

VII. CONCLUSION

“It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”¹⁶⁵ Today, more than ever in the history of our nation, Americans are faced with widespread global terrorism threats. Therefore, the most technologically-advanced weapons are essential to protect not only civilians but also the military men and women who fight for the freedoms inherent to the American way of life.

Unfortunately, the Cadillac Tax and Employer Mandate are causing corporations that hold the majority of the United States Department of Defense contracts to consolidate, cut budgets and promote globalization initiatives because a corporation cannot answer to its shareholders after being assessed a 40 percent excise tax—especially while U.S. defense contracts are consistently minimized because of defense budget cuts. The

¹⁶¹ Elisabeth Rosenthal, “*How the High Cost of Medical Care Is Affecting Americans*,” NY TIMES, (Dec. 18, 2014).

¹⁶² Mary Agnes Carey, *A Quarter Of Uninsured Say They Can’t Afford To Buy Coverage*, Kaiser Family Foundation, (Nov. 21, 2014).

¹⁶³ Troy, *supra* note 43, at 1 (stating over 105 million Americans will find health care “unaffordable” under the ACA definition).

¹⁶⁴ Pat Riley, *The Winner Within*, (Penguin Pub. Group 1994) (quoting Pat Riley).

¹⁶⁵ *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)).

U.S. government has entrusted corporations like Lockheed Martin, Boeing, and GD with the safety of our soldiers and the security of our nation. Without these corporations, the U.S. minimizes its ability to project power overseas, which diminishes power to protect Americans from global threats.

Healthcare reform should never diminish our protections as American citizens but should instead protect us even more. Therefore, although reform is crucial for the health of Americans, it should never be paired with unnecessary, expensive administrative complexities or burdensome taxation that degrades the safety and security of America.

